C.

JURISDICTIONAL STATEMENT.

Jurisdiction is conferred by Section 240 (a) of the Judicial Code as amended by act of February 13, 1925 (28 U. S. C., Section 347 (a)), making it competent for this court on the petition of any party in any civil case in a Circuit Court of Appeals to require by certiorari after judgment of such court that the cause be certified to this court for determination by it with the same power and authority and with like effect as if the cause had been brought by unrestricted appeal.

The judgment of the Circuit Court of Appeals for the Sixth Circuit, amending and, so amended, affirming the order of the District Court appealed from, was entered April 12, 1943.

Petitions for rehearing were filed in due time and upon consideration, all were, on June 3, 1943, denied (R., 423).

Your petitioner made application to the Supreme Court of the United States for an extension of time for filing a cross-petition for certiorari and the time was extended by one of the associate justices of the Supreme Court to October 4, 1943, therefore, this petition is filed within the time limit prescribed by the act of February 13, 1925.

D.

PRAYER.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 9333, **Crites, Incorporated,** Appellant, v. **Prudential Insurance Company of America** and **Richard Simkins** and **George Florence,** as co-receivers, Appellees, and that the said judgment of the United States Circuit Court of Appeals for the Sixth Circuit may be amended by this Honorable Court to conform with the opinion of the lower court, allowing fees to the counsel for the receivers and further relief in the premises as to this Honorable Court may seem meet and just, and your petitoner will ever pray.

Richard Simkins and George Florence,
Receivers,
By Ralph G. Martin,
Counsel for Petitioner.

Osmer C. Ingalls,
Of Counsel.

BRIEF IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI.

I.

RECORD.

Crites, Incorporated, respondent herein, has filed a petition for writ of certiorari in this court, which cause is numbered 317 and has filed with the petition a copy of the printed record. Cross-petitioner will refer to that printed record for references herein.

II.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals of the Sixth Circuit (R., 387-393) is found in 134 Federal (2d), 925.

III.

STATEMENT OF THE CASE.

Brief facts give a history of the case jurisdiction and the issues and questions presented have been stated in petitioners' cross-petition and in respondent's petition.

IV.

SPECIFICATION OF ERRORS TO BE URGED.

(a)—The Circuit Court of Appeals erred in modifying the order of the District Court.

(b)—The Circuit Court of Appeals erred in deciding an important question by amending the judgment of the District Court based upon erroneous facts not found in the record, and it has so far departed from the accepted and usual course of judicial facts found in the record so as to call for an exercise of this court's supervision.

(c)—The Circuit Court of Appeals erred in erroneously applying the bankruptcy rules as to the division of fees between the forwarder and receiver in this case. The Supreme Court has never passed upon the question of the division of fees between forwarder and receiver in an equity receivership as it has in bankruptcy cases under rule number forty-two (42).

V.

ARGUMENT.

The Circuit Court of Appeals relied mostly upon appellant's brief and not on the facts in the record and has unjustly penalized counsel who has been entirely free from the criticism directed against them by the Circuit Court of Appeals.

Following the sub-heads in our cross-petition, let us point out where the facts in the record were either overlooked or ignored by the Circuit Court of Appeals.

A. No Appointment of Counsel.

The Circuit Court says (R., 389) that there is no order appointing counsel appearing of record, yet the appointment of counsel appears in the order of March 3, 1932 (R., 13).

B. Agreement to Divide Fees.

The master (R., 91) agreed that there was a mutual agreement as to the appointment of receivers and the attorneys for them between Harrison, Simkins and Ingalls, that Ingalls and Simkins did agree to share fees and that Ingalls paid to Simkins a substantial sum received from the Prudential, but made no finding that there was any other agreement between any of the parties to divide fees, nor did he make a finding that there had been any division of fee arising out of the trust estate. The master did disallow Ingalls' application for fees filed in 1937 because some of the items therein included were in behalf of the Prudential and directed Ingalls to file a new application show-

ing only services rendered to the trust, which was done by Ingalls.

The master did not recommend disallowance of a reasonable fee to Ingalls and the District Court did, later on, with full knowledge make allowance of twenty-two hundred ($2200.00) dollars to Ingalls.

The testimony in the record (R., 407) is that Ingalls was approached by Simkins and asked to join with Harrison as counsel for the Prudential and asked one-half of the fees paid by the Prudential as a division between forwarder and receiver. So one-half of the fees paid by the Prudential for the bringing of the action was paid to Simkins. There was no other division made of money coming out of the trust, or otherwise, nor any attempts or suggestions of division of such funds appearing in the record, or otherwise. (R., 116-143.) The best evidence that there was no general agreement to divide fees arising out of the trust estate as found by the Circuit Court of Appeals is brought out by the following:

Simkins, in April, 1934, drew a fee of eighteen hundred ($1800.00) dollars as receiver, which Ingalls knew nothing about until December, 1934 (R., 116) and Harrison (R., 230) who was present in April, 1934, when the fees were paid to the receivers would naturally have seen to it that Ingalls and himself were paid attorney fees if there had been a general agreement to divide fees.

Furthermore, if there had been an agreement to divide fees between the three, Harrison would not have on June 7, 1937 (R., 125) and (R., 264) in behalf of the Prudential have filed objections to Ingalls' application for fees. If Ingalls were to have divided fees out of the receivership estate, with Simkins, Simkins would have seen to it that Ingalls was paid a counsel fee at the same time he drew eighteen hundred ($1800.00) dollars.

Harrison drew two hundred fifty ($250.00) dollars in fees and made no further application so it can be assumed that he was paid by the Prudential. There was no demand by Harrison or Simkins upon Ingalls to divide the twenty-two hundred ($2200.00) dollars that was ordered by the lower court in 1940.

In fact, the entire record absolutely disproves that there was a general agreement other than the agreement between Ingalls and Simkins to divide fees paid by the Prudential, which agreement in no sense invaded the authority of the court to fix the fees of the receivers and counsel, which practice was found objectionable in the case of **Weil v. Neary**, 278 U. S., 160, cited by the Circuit Court of Appeals as its authority for the refusal to allow further counsel fees. In the Weil case there was a contract between the attorney for the trustee and Untermeyer, attorney for the creditor, whereby the compensation to be allowed the attorney for the trustee and work done should be performed under Untermeyer's supervision, which, of course, was contrary to public policy and professional ethics. This agreement was void under Rule 42 of the Bankruptcy Act as well.

Corpus Juris Secundum, Volume 7, page 1034, says that it is not unethical or illegal for one attorney to divide fees with another attorney except where the agreement is against public policy and in bankruptcy agreements.

In the instant case, the agreement between Ingalls and Simkins did not invade the authority of the court to fix the fees, and the court will observe that there was no division whatsoever of fees coming out of the trust estate.

The Circuit Court of Appeals in its decision (R., 393) cited **Woods v. National Bank**, 312 U. S., 262. This is another bankruptcy case where the division of fees was made

between counsel who were hostile and represented conflicting interests. The court in that case says that those expenditures should be allowed which had clearly benefited the estate.

Now, of the courts, which is the better one to determine whether or not counsel have violated the proprieties and determine whether or not there has been divided allegiance and fee-splitting which invaded the authority of the court to fix the fees? Our contention is that it is the master and lower court who have the opportunity to hear and observe the witnesses. This court in **Trustee v. Greenough**, 25 U. S., 527, 537, where this subject is discussed, has stated that the action of the court below in this respect is treated as presumably correct.

Now, the lower court, in 1940, heard an application for compensation by O. C. Ingalls for services rendered up to May 25, 1939, and after a hearing in open court, the only opposition being made by Crites, Inc., the District Court with full knowledge of the so-called divided allegiance and fee-splitting allowed Ingalls twenty-two hundred ($2200.00) dollars compensation up to that date.

In the hearing upon Ingalls' fees (R., 403-404) Crites, when asked by the court stated that their objection to the allowance of Ingalls' fee was because most of his time had been spent in defending the receivers' accounts against exceptions filed. (R., 404.) The court specifically asked Ingalls if he had participated in any manner with Simkins and Ingalls said he had not.

In addition to the services for which the lower court awarded Ingalls a fee of twenty-two hundred ($2200.00) dollars (it was stipulated (R., 386) that the itemization of services attached to the petition made need not be printed, but would be contained on the record of appeal, so this

itemization will not appear in the record filed in this case by Crites, Inc., but it was on this itemization that the court allowed the fee of twenty-two hundred ($2200.00) dollars), Ingalls has since that time represented the receivers, briefed the matter, argued the case in the Circuit Court of Appeals, prepared briefs, prepared cross-petition and supporting brief in this court and is prepared to file an answering brief to Crites' petition in this court, and since the Crites, Inc., shows no fraud, connivance or collusion of any kind, Ingalls should be entitled not only to the fee allowed by the lower court, but to additional fees for further representation.

The master and the lower court found that all the expenditures made had benefited the estate. There was not sufficient funds in the estate to pay Ingalls his fee of twenty-two hundred ($2200.00) dollars and other expenses incident to the exceptions and the lower court ordered Prudential to pay approximately thirteen hundred ($1300.00) dollars into the estate so that there should be sufficient amount of money to pay this fee and other expenses and here we have the anomaly of the Prudential paying money into the court to pay Ingalls' fee and the Circuit Court of Appeals denying him a right to participate in the funds paid into court by Prudential for that purpose.

The Circuit Court of Appeals cited (R., 393) **Tracy v. Willys Corp.**, 45 Federal (2d), 485, as a similar transaction, which is not true. Mr. Tracy, counsel for the receivers, stepped out of the case, had another attorney appointed to represent the receivers and then purchased the assets of the receivers' sale. The court held that he was not entitled to fees out of the trust estate.

C. Fee-splitting Found Reprehensible.

The master did not find fee-splitting reprehensible as stated by the Circuit Court of Appeals, although he did say that Judge Hough had no knowledge or information as to the fee-splitting arrangement and to that extent was imposed upon (R., 92).

Judge Hough allowed a fee of two hundred fifty ($250.00) dollars which was allowed to stand by the Circuit Court of Appeals. The Circuit Court of Appeals admitted (R., 393), that Judge Hough knew of the dual allegiance when he allowed the two hundred fifty ($250.00) dollars fee but did not know of the fee-splitting arrangements and we contend that there is nothing in the record to show that he did not know of the fee-splitting arrangement and there is no just assumption on the part of the master (R., 92) that Judge Hough was not advised of the agreement.

The only place in the record where that has been discussed was (R., 280) when Simkins was asked if he had told the court about the division of fees with anyone and he answered "No, I don't think so." If there had been a general agreement between Ingalls, Simkins and Harrison to divide fees arising from the trust and there had been a division out of the trust funds, there might have been an invasion of the court's right to fix fees—but those facts do not exist.

CONCLUSION.

The Circuit Court of Appeals is inconsistent in approving the receivers' accounts and at same time penalizing Ingalls who had carried the burden of having those accounts approved by that court. Crites admits Ingalls knew nothing about the Jones-Proctor deal (R., 408) yet the Circuit Court of Appeals, applying bankruptcy rules and facts not found in the record penalized Ingalls who is looking solely to the trust for his fees.

We maintain that the Circuit Court of Appeals for the Sixth Circuit has gone so far astray on factual and legal principles that this court should permit certiorari to be granted.

Respectfully submitted,

RALPH G. MARTIN,
Attorney for Cross-Petitioner.

OSMER C. INGALLS,
Of Counsel.